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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CHRIS KOHLER, Plaintiff, vs. THE VONS COMPANIES, INC. dba VONS #2360, Defendant.	Case No. 08cv0082 IEG (RBB) Plaintiff's Reply Brief in Support of His Motion for Attorneys' Fees, Including Litigation Expenses and Costs Date: May 5, 2008 Time: 10:30 a.m. Ctrm: 1, 4th Floor Honorable Irma E. Gonzalez [No Oral Argument Unless Requested by the Court]

I. BACKGROUND

Following settlement of this action, plaintiff Chris Kohler filed a motion for attorneys' fees and costs in an amount totaling $7,008.50.[1] Defendant The Vons Companies, Inc., dba Vons #2360 (hereinafter "Vons") opposes Kohler's motion. Defendant bases its opposition on the following: 1) the numbers of hours billed by plaintiff's counsel is unreasonable simply because Kohler's counsel has filed hundreds of similar cases; 2) the requested hourly rates are excessive and should be reduced; and 3) some work should be eliminated or reduced as it was boilerplate in nature. Kohler now submits his Reply brief in response.

II. DISCUSSION

A. The Requested Fees are Reasonable and Necessarily Incurred

First, the amount of fees and costs requested, a little over $7,000, is eminently reasonable, especially in light of the fact plaintiff obtained both injunctive relief and damages – exactly what he sought. This is an "excellent result," justifying full compensation of reasonable attorneys' fees and costs. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee").

Furthermore, the starting point for calculating the amount of a reasonable fee is the number of hours reasonably expended multiplied by a reasonable hourly rate – the "lodestar." There is a strong presumption that, once calculated, the lodestar amount is reasonable, and should only reduced in "rare and exceptional cases." *See Fischer v. SJB-P.D., Inc*, 214 F.3d 1115, 1119 (9th Cir. 2000) (emphasis added); *see also Harris v. Marhoefer*, 24 F.3d 16, 18 (9th Cir. 1994). Kohler argues that the instant

[1] The amount of costs is $383.00, and defendant has not opposed this amount.

matter is *not* one of those "rare and exceptional cases" warranting a reduction in the lodestar, nor does Vons present any evidence to the contrary.

1. The Reasonableness of Hours Billed

First, the amount of hours billed is extremely reasonable. Kohler's counsel billed less than 24 hours in this matter – three (3) days of work. This is, by any definition, an extremely modest and reasonable amount of work for this case.

Boiled to its essence, Vons' argument seems to be: *why should plaintiff's counsel get any fees at all…after all, he has used boilerplate documents in some instances*? But the fact that plaintiff's counsel has experience in federal courts and a specific area of law doesn't automatically make his work product "boilerplate." As courts in cases with similar facts have noted: "Indeed, it appears that earlier instance of [counsel's] complaints are [somewhat] identical. It is unclear, however, why uniform instances of misconduct do not justify uniform pleadings." *Wilson v. Pier 1 Imports (US), Inc.*, 411 F.Supp.2d 1196, 1201 (E.D.Cal.2006).

An argument that fees should be *reduced* for a task or document simply because attorneys have completed the same task or drafted the same document in the past is without merit, and Vons provides no legal support for such an argument. Merely because a similar document has been generated in the past does not equate to an argument that all fees for such documents should be denied. This is especially so when the counsel in question specializes in a specific area of law.

Nor does occasional use of template-type documents imply that the document is automatically clerical in nature. Truly, in the practice of law – *practically* speaking – past documents are often used as templates for current or future documents, and Kohler feels extremely confident in stating that even defendant's counsel follows the variation of the tenet of "no need to re-invent the wheel" every time. However, that fact of business (and Kohler would go so far as to state that this applies to many businesses besides the practice of law) does not preclude the reality that fresh data and facts must still be collated, analyzed, and incorporated into a new document each and every time.

In short, the use of past legal templates for new cases is not a reason to reduce the lodestar calculations – it most certainly is not an example of "rare and exceptional cases" warranting a reduction in the lodestar

2. Reasonably Hourly Rate

Vons asserts that the requested hourly rates by Kohler are excessive and should be reduced.[2] Kohler disagrees. Apart from the factors of skill and experience – which Kohler detailed in his original filing for fees – there is another reason that the requested hourly rate is reasonable.

Essentially, plaintiff's counsel is asking the Court "for a raise," as district judges have awarded the same hourly rate in this District for nearly a decade, and it's time for a cost-of-living raise to match inflation. *See, generally*, *D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1383 (9th Cir. Cal. 1990); *Jordan v. Multnomah County*, 815 F.2d 1258, fn. 7 (9th Cir. Or. 1987).

Utilizing data from the United States Department of Labor, the Bureau of Labor Statistics ("BLS"), inflation has increased approximately 25% (nationwide) since 1998,[3] yet the hourly rates awarded in the

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[2] As a refresher, Kohler is requesting: $350/hr for lead counsel Lynn Hubbard, III; $225/hr for attorney Scottlynn Hubbard; and $90/hr for paralegal work.

[3] *See* http://inflationdata.com/inflation/Inflation_Rate/InflationCalculator.asp, which uses data directly from the BLS. Using the inflation calculator provided on this webpage, the inflation rate from January, 1998, to January, 2007, is 25.26%.

Southern District of California (in ADA cases such as this) have remained the same. So even though judges in this district have awarded the same hourly rate, the hourly rates of ADA lawyers throughout the State of California, the San Diego area, and other district courts have increased to match inflation and the cost-of-living.

Furthermore, the BLS has even compiled data specific to the city of San Diego, based on cost-of-living data – predicated upon the Consumer Price Index, or "CPI". If one compares several Consumer Price Index figures, it is readily apparent that Kohler's requested increase for hourly rates is not unreasonable. For example:

- The CPI for all western (U.S.) urban areas increased from 163 in January 1998, to 218.533 in Mar 2008;[4]
- The CPI for San Diego went from an annual rate of 163.7 in 1997, to an annual rate of 233.321 in 2007[5];
- The CPI for the entire U.S. went from 161.6 in January 1998, to 213.5 in March 2008;[6].

Thus, the increase in the CPI of the western U.S. – as well as that of San Diego – closely tracks that of the national increase in the CPI from 1997 to 2007; indeed, the CPI has had a *greater increase* in the western U.S. than the national average, and the San Diego region has had *an even greater increase in the CPI than the Western region as a whole.*

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[4] This data is obtained by visiting the BLS site http://data.bls.gov/cgi-bin/surveymost?cu, and choosing which set of data to retrieve (in this case, "West Region, All Items."

[5] This data is obtained by visiting the BLS site http://data.bls.gov/cgi-bin/surveymost?r9, and choosing which set of data to retrieve (in this case, "(CPI-U) San Diego, CA All Items"

[6] This data is obtained by visiting the BLS site http://data.bls.gov/cgi-bin/surveymost?cu, and choosing which set of data to retrieve (in this case, "U.S. All Items, 1982-84."

Therefore, as the U.S. Bureau of Labor and Statistics has calculated a national increase in inflation of 25% based on the national CPI, it is logical that the inflation rate of San Diego and the western urban U.S. has also increased *at least* 25%.

Kohler would highlight Senior Eastern District Court Judge Lawrence Karlton's reasoned take on this subject:

> While courts may appropriately look to previous cases for guidance in determining the prevailing market rate, **exclusive reliance on such historical data would lock-in a fixed rate that ignores inflation and other market pressures affecting the cost of legal services. Accordingly, rate increases over time are appropriate**.

See Dodson v. Albertson's, Inc., et al, 2008 WL 298823, *3 (E.D. Cal. Feb. 1, 2008) (emphasis added), *citing Friend v. Kolodzieczak*, 72 F.3d 1386, 1391 n. 5 (9th Cir. 1995) (finding a $50 rate increase in hourly billing rates over 3 years to be "reasonable in view of inflation and costs of legal services"); *Associated Indem. Corp. v. Fairchild Indus., Inc.*, 961 F.2d 32, 35-36 (2nd Cir. 1992) (courts may take judicial notice of inflation).

Relying on this reasoning, Judge Karlton of the Eastern District then awarded $350/hour to Lynn Hubbard, $225/hour to Scottlynn Hubbard, and $90/hour for paralegal work. *See Dodson*, 2008 WL 298823 at *3. Kohler respectfully urges this Court to follow Senior Judge Karlton, and grant Kohler's counsel's request for an increase in hourly rates.

3. The Lodestar is Reasonable

Vons has presented no evidence or argument that this instant case falls into the category of "rare and exceptional" cases that warrant a reduction in the lodestar (*Fischer*, 214 F.3d at 1119), and as Kohler has shown both that the hours billed and the requested hourly rates are reasonable (once this Court has taken into account the rate of inflation in San Diego over the past ten years), Kohler respectfully argues that this Court need not reduce the lodestar.

III. CONCLUSION

Vons's arguments concerning Mr. Kohler's request for fees and costs are without merit. The number of hours billed – a little less than three (3) days' work – is eminently reasonable. Furthermore, Kohler has provided ample support for an increase in the hourly rates of his counsel and their staff, hourly rates that have remained stagnant for nearly a decade. Indeed, Senior Eastern District Court Judge Lawrence Karlton has already begun awarding higher hourly rates in ADA cases due to inflation and increased cost-of-living. Kohler respectfully requests that this Court follow Judge Karlton's lead and do the same in the instant matter.

Finally, Vons has not provided any evidence that this case is in the category of "rare and exceptional" cases that warrant a reduction in the lodestar. Thus, no reduction to the lodestar is necessary or even warranted by law. Therefore, Kohler would respectfully ask that this Court award him in full the requested fees and costs.

Dated: April 21, 2008 DISABLED ADVOCACY GROUP, APLC

/s/ Lynn Hubbard, III, Esquire
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